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In the
Supreme Court of the United States
October Term, 1978

No. 78-759

WAYNE L. KIDWELL, Attorney General
of Idaho, et al.,
Appellants

v.

GREAT WESTERN UNITED CORPORATION,
Appellee

On Appeal From the United States
Court of Appeals For The Fifth Circuit

Amicus Curiae Brief for the Commonwealth of Massachusetts

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Interest of the Amicus

Pursuant to Supreme Court Rule 42(4), the Commonwealth of Massachusetts submits this amicus curiae brief to reinforce the position of the State of Idaho (1) that the Idaho statute has not been pre-empted by the Williams Act amendments to the

Securities Exchange Act of 1934; and (2) that the Idaho statute does not impermissibly burden interstate commerce.[1/]

Like Idaho and some thirty-four other states,[2/] Massachusetts has enacted a takeover statute, M.G.L. c.110C, §§1-13, which imposes requirements on tender offerors beyond those mandated by the Williams Act. Much like the Idaho statute, M.G.L.

[1/] The position of the Commonwealth on the questions of jurisdiction and venue has been well presented in the amicus curiae brief filed by the State of New York, in which the Commonwealth has joined.

[2/] See Note: Securities Law and the Constitution: State Tender Offer Statutes Reconsidered, 88 Yale L.J. 510, 514 n.29 (1979) (compilation of all state takeover statutes).

c.110C establishes a procedural framework designed to promote informed and unhurried decisions by persons who receive tender offers for shares in target companies organized or headquartered in Massachusetts. The statute provides for full and fair disclosure of material information (§§2, 3, 5, 7), a waiting period prior to effectuating a takeover bid (§2), a minimum period during which a tender offer must remain open (§7), uniform treatment of all shareholders (§7), offeree withdrawal rights up to five days prior to the announced termination date of the offer (§7), pro rata take-up of shares in the event a greater number of shares are deposited than the offeror is bound to accept (§7), allowances for price increases (§7), a hearing procedure commenced at the discretion of the Secretary of the Commonwealth (§6), exemptions for certain transactions (§§1, 10-12), and civil and criminal remedies for violations (§9).

Recently, the constitutionality of the Massachusetts regulatory scheme has been challenged by a company seeking to make a takeover bid governed by the statute. On February 9, 1979, Tyco Laboratories, Inc. (Tyco), a Massachusetts corporation, announced its intention to make a tender offer for the shares of Ludlow Corporation, also a Massachusetts corporation. On the same day, Tyco filed suit in the United States District Court for the District of Massachusetts, claiming that the Massachusetts takeover statute was pre-empted by the Williams Act and created impermissible burdens upon interstate commerce. Tyco Laboratories, Inc., et al. v. Connelly, et al., Civil Action No. 79-265-T (complaint filed Feb. 9, 1979). Relying heavily on Great Western United v. Kidwell, 577 F. 2d 1265 (5th Cir. 1978), Tyco asked the court for a temporary restraining order enjoining the appropriate

Massachusetts officials from enforcing the provisions of chapter 110C in the event the company went forward with its proposed tender offer. The court denied the request on February 13, 1979, and scheduled hearings in March to determine whether there exists a factual basis for Tyco's allegations that the Massachusetts statute significantly frustrates the purpose and operation of the Williams Act and that it imposes undue burdens upon interstate commerce.

Because the substantive issues in the Great Western case are identical to those presented in Tyco, the continued viability of the Massachusetts statute may depend upon whether this Court rejects the course which the Fifth Circuit has taken in its invalidation of the Idaho statute. Accordingly, the Commonwealth submits this brief in support of the appellants' position that the Idaho statute is neither

pre-empted by the Williams Act nor invalid under the Commerce Clause.

QUESTIONS PRESENTED

1. Whether the Idaho Takeover Statute stands as an obstacle to the Congressional purpose of shareholder protection expressed in the Williams Act amendments to the Securities Exchange Act of 1934 and is thus invalid under the Supremacy Clause of the United States Constitution.

2. Whether the Idaho Takeover Statute impermissibly burdens interstate commerce and is thus invalid under the Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

The Commonwealth of Massachusetts adopts and incorporates herein the statement of the case set forth in the Appellant's brief.

SUMMARY OF ARGUMENT

The Court of Appeals based its conclusion of pre-emption not on any manifestation of a Congressional intention to occupy the field of tender offer regulation, but rather on findings that the Idaho statute impermissibly conflicted with the purpose of the Williams Act. The Court viewed the effecuation of a policy of neutrality between offerors and incumbent management as a Congressional policy not to be disturbed by state action. This view, however, fails to recognize that the sole purpose of the Williams Act is to protect shareholders. Unless it can be shown that the Idaho statute frustrates that purpose, there is no pre-emption.

Because the Idaho takeover statute merely imposes certain reporting and timing requirements as a reasonable supplement to the Williams Act, and shares the same basic purpose of

investor protection, it must be sustained under the Supremacy Clause.

Idaho has an important and substantial interest in protecting shareholders of target companies. The putative burdens on interstate commerce, which did not materialize in this case, are not disproportionate to the legitimate benefits the statute provides.

ARGUMENT

I. THE IDAHO TAKEOVER STATUTE DOES NOT CONFLICT WITH THE PURPOSE OR OPERATION OF THE WILLIAMS ACT AND STANDS AS A LEGITIMATE STATE EFFORT TO REGULATE CORPORATE TAKEOVERS.

The standards governing the application of the Supremacy Clause to state regulatory efforts separate two lines of inquiry: (1) whether there is clear evidence of a Congressional intent to occupy the field; and (2) whether the state action actually conflicts with the purpose and operation of federal law. Florida Lime & Avocado Growers, Inc. v. Paul,

373 U.S. 132, 141 (1963). In addition, because of the delicate balancing required whenever considerations of federalism are implicated, special rules have evolved for the specific contexts in which a pre-emption question arises. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973) ("Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question . . ."). Traditionally, the field of securities transactions is one in which state regulation has been allowed to co-exist with the federal scheme[3/] and where "the proper

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[3/] See, e.g., Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

approach is to reconcile 'the operation of both [state and federal] statutory schemes with one another rather than holding one completely ousted.'" Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973), quoting Silver v. New York Stock Exchange, 373 U.S. 341, 351 (1963). See also SEC v. National Securities, Inc., 393 U.S. 453, 461 (1969) ("Of course, under the securities laws state regulation may co-exist with that offered under the federal securities laws.").

The Court of Appeals acknowledges that "[n]othing in the 1934 Act explicitly pre-empts all state takeover legislation; indeed §28 [of the Securities Exchange Act of 1934] has a contrary tone." It is beyond question that there is no clear manifestation of a Congressional intention to assert exclusive federal regulation of tender offers, and §28(a) may well be read to create a

presumption against pre-emption.

Moreover, the Williams Act does not create a pervasive and comprehensive federal regulatory scheme which may evidence a Congressional intent to occupy the field of tender offer regulation. See New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 415 (1973) (pre-emption not to be inferred solely from comprehensiveness of federal regulation). Cf. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973). Rather, the Act requires certain minimum disclosures relative to tender offers, and affords certain substantive protections to tendering shareholders.[4/] As such, it

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[4/]Section 14(d) of the Act provides that a person making a formal tender offer must file a Tender Offer footnote continued

represents a limited, and under the terms of §28 of the Act, non-exclusive

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[4/]footnote continued Statement Schedule 14D-1. 42 Fed. Reg. 38341 (1977). The Schedule includes certain information which must be revealed to target company shareholders: the purchaser's identity and background; the amount and source of funds for the purchase; the extent of the purchaser's holdings in the target; any plans to liquidate, merge, or make other changes in the target's business or corporate structure in the event control is acquired; past negotiations or transactions with the target company; and financial information about the purchaser material to the offer. The Act also permits tendering shareholders to withdraw tendered stock during the first seven days footnote continued

entry into the relatively new field of cash tender offers.

The Court of Appeals' finding of pre-emption rests instead on a "conflict" between the Idaho statute and the Williams Act. The court suggests that the fact that Idaho "chose to protect investors differently from the way Congress protected investors" is a demonstration of conflict. Great

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4/ footnote continued following publication of the offer, or after sixty days if the offeror has not already purchased the tendered shares. If the offer is for less than all of the target's shares, the offeror must take up all shares tendered during the first ten days on a pro rata basis. Finally, a price increase must also be paid to shareholders who tendered stock at the lower price. 15 U.S.C. §78n(d)(5), (6), (7) (1976).

Western, supra at 1279. However, the mere demonstration of a difference between the state and federal schemes does not lead necessarily to the conclusion that there is sufficient conflict to violate the Supremacy Clause. See Florida Lime and Avocado Growers, Inc. v. Paul, supra, at 141 (the difference between state and federal regulatory schemes merely poses the pre-emption question; it does not answer it).

The proper test for determining a conflict is whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Although the Court of Appeals purported to apply the Hines test to the alleged incompatibility between the Idaho statute and the Williams Act, it misconstrued the Congressional purpose and objective underlying the Williams

Act. The court viewed what it called a policy of neutrality among contestants in a tender offer to be the "cornerstone" of the Congressional approach to investor protection. Great Western, supra, at 1277. It is submitted that this conclusion is based on an erroneous interpretation of the purpose of the Williams Act.

As this Court has noted, there was no deliberate Congressional effort to create a condition of "neutrality" among competing parties. Any balance or neutrality came about as an incidental effect of the lawmakers' desire to require full and fair disclosure for the benefit of investors. Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 29 (1977). The state statutes, including Idaho's, promote the same basic purpose of disclosure and any perceived imbalance is not an effect which stands in the way of the "sole purpose" of the Williams Act. See

Piper v. Chris-Craft Industries, Inc., supra at 35. Moreover, because "tender offerors were not the intended beneficiaries of [the Williams Act]", id. at 28, adverse financial or tactical impact upon a tender offeror such as Great Western United is an insufficient basis upon which to find impermissible conflict. Therefore, the purpose and objective of the Williams Act -- investor protection -- is not frustrated by or in conflict with Idaho's takeover law but is supplemented by it.

The Idaho statute, and the others like it, build upon the disclosure requirements of the Williams Act and add to them further reasonable and complementary protections for shareholders. Idaho's law requires disclosure, tends to delay the consummation of tender offers, and perhaps makes their completion more measured and orderly. None of these

effects is incompatible with the Williams Act.

A realistic look at a corporate takeover supports this view. What is at stake is the acquisition of a corporation not by traditional methods of merger, sale of assets and the like, but rather by a massive and urgent offer to individual shareholders. Given the pressures of the situation and the offeror's desire to consummate the acquisition at the cheapest possible price, it is not unreasonable for states to enact statutes seeking more complete disclosure and sufficient time for shareholders to review the adequacy of the offer in the light of current and long range values.

Compared to other modes of acquiring corporate control, such as a sale of assets, mergers or other corporate transactions, the cash tender offer is likely to yield less

to the target's shareholders than might be obtained by the target's management in a negotiated takeover.[5/] Furthermore, it is

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[5/] One commentary notes:
"Even an overhead tender price is likely (in the absence of strong opposition) to produce less for a seller than would theoretically be produced by a hypothetical bargain between management of a seller single-mindedly devoted to getting the maximum price and management of a buyer equally devoted to paying the minimum price. Since the tender price is unilaterally set at what the buyer believes is just enough to capture the public stockholders' acquiescence, it will not reflect the same sharing of the full gains of the merger, which a single negotiator for the

footnote continued

probable that any delay resulting from

5/ footnote continued
seller is more likely to perceive and demand than would the dispersed stockholders of the seller. The seller's public stockholders are thus exposed to the risk of receiving less from a tender solicitor than they would receive in a bargain negotiated by diligent management, because each investor's individual interest is so fractured as to preclude either the efficient acquisition of investment information or the exercise of the concentrated bargaining power which would be available in a merger negotiation conducted on their behalf." Brudney and Chirelstein, Fair Shares in Corporate Mergers and Takeovers, 88 Harv. L. Rev. 297, 341 (1974).

the operation of state takeover statutes actually benefits the target's shareholders and leads to an increase in price. Pressures to sell quickly are alleviated and management has an opportunity, in the exercise of its strict fiduciary duty, to develop more attractive alternatives. Also, a longer period permits the formation of an auction market for the target's stock, eventually driving the price higher than the original offer. Thus, even if the original offeror is unsuccessful in its takeover bid, the target shareholder is likely to earn large returns. See Dodd and Ruback, Tender Offers and Stockholder Returns, An Empirical Analysis, Journal of Financial Economics (Dec. 1977).

These effects of state takeover statutes are beneficial to shareholders though they may inconvenience offerors. However, Piper makes plain that offerors are

not the intended beneficiaries of the Act but are among those to be regulated. Tender offerors, in short, are not guaranteed a positive result under the Williams Act, and any adverse impact upon them resulting from the state statutes is not to be deemed an impermissible conflict with the Congressional purpose.

Accordingly, because the Idaho statute does not conflict with the federal objective of protecting target company shareholders, it is not pre-empted by the Williams Act.

II. THE IDAHO TAKEOVER ACT DOES NOT IMPEDE THE FREE AND EFFICIENT FLOW OF INTERSTATE COMMERCE AND IS NOT INVALID UNDER THE COMMERCE CLAUSE.

The determination of the validity of the Idaho statute under the Commerce Clause requires the balancing of legitimate local interests against the degree of burden imposed on interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137,

142 (1970). The Court of Appeals, applying the Pike formula, determined that the only legitimate state interests at stake were the protection of local shareholders and the encouragement of civic-minded management. Great Western, supra at 1282-83.

Though the Court specifically discounted Idaho's interest in protecting all shareholders in the target company, there is no principled distinction between extraterritorial protection of shareholders in the tender offer context and extraterritorial protection of shareholders in the context of other corporate acquisition methods. Indeed, this Court deferred to Delaware's "short-form merger" statute in Santa Fe Industries v. Green, 430 U.S. 462, 479 (1977), quoting Cort v. Ash, 422 U.S. 66, 84 (1975):

> 'Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.'

To the extent a tender offer seeks to effect a change in the control of a target corporation, it is directly related to the corporation's internal affairs, a matter traditionally recognized as a matter of state regulatory concern. Santa Fe Industries v. Green, supra.

Weighed against these interests, the only actual impact of the Idaho statute on interstate commerce recognized by the Court of Appeals was the stopping of a $31,000,000 offer to

purchase. Great Western, supra at 1284. The court's reliance on this event was in error, however, because the offer was "stopped" as a result of non-compliance with the Idaho statute. Rather, the court should have inquired into what the impact on commerce might have been even if Great Western United were to have complied with the statute's requirements. To measure the impact of anything other than compliance with the state scheme is to assess the constitutional validity of a result not intended by the Idaho legislature.

Moreover, because the Commerce Clause protects the interstate market as a whole, rather than particular firms, from burdensome state regulation, the Court should have assessed the likelihood that aggregate tender offer activity would be substantially burdened by the takeover statute. See Exxon Corp. v. Governor

of Maryland, 437 U.S. 117, 127-28 (1978) (court discounted assertion that oil companies would abandon their Maryland operations as a result of statute prohibiting integrated oil compoanies from owning retail gasoline stations; those suppliers' share of the market would likely be assumed by other suppliers so that total flow of goods in interstate market would not decrease). See also Ray v. Atlantic Richfield Co., 435 U.S. 151, 181 (1978) (amount of oil processed at Puget Sound refineries has not declined as a result of local tug escort requirement). The evidence suggests that such a reduction in tender offer activity has not occured.6/

6/Despite the existence of thirty-six state tender offer statutes, the use of the tender offer footnote continued

Viewed realistically, disclosure requirements, timing factors, pro rata purchase provisions, and minimum offering periods do not and have not excessively burdened interstate commerce in the light of the very real benefits they provide in reducing pressures on stockholders in the typical "Saturday Night Special" situation. State statutes also work toward the objective of ensuring that shareholders have the chance to

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6/footnote continued as a technique for seeking corporate control has "virtually exploded." See Mishkin & Nathan, "Tender Offers Continue to Surge As New Laws and Cases Alter Tactics," N.Y.L.J., Dec. 19, 1977, at 30, col. 1; id. at 32, col. 2, cited in Note, Securities Law and the Constitution: State Tender Offer Statutes Reconsidered, 88 Yale L.J. 510, 523 (1979).

receive adequate value for their shares.

Therefore, the "burdens" on interstate commerce are fully justified by the state of Idaho's legitimate interest in investor protection. The impact on interstate commerce does not outweigh the local benefits. Pike v. Bruce Church, Inc., 597 U.S. 137, 142 (1970).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed and the complaint ordered dismissed.

Respectfully submitted,

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